

**IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

In the Interest of
R.B.,

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) Appeal No. ED85549
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Appellant's Brief

Dated October 12, 2005

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STATEMENT OF JURISDICTION

This matter involves an appeal from the portion of the Findings, Recommendation and Judgment Denying Jurisdiction of the Honorable Elizabeth W. Swann, Commissioner of the Family Court, 11th Judicial Circuit suppressing an audio and video recording in a delinquency case. The audio and video recording was made during the forensic interview portion of a child victim which occurred as part of the Saint Charles County's Child Advocacy Center process. The Court suppressed the evidence as a violation of the juvenile's Sixth Amendment right to confrontation, holding that the United State Supreme Court decision in *Crawford v. Washington*, 124 S. Ct 1354 (2004), prohibited the admission into evidence of the video. Appellant has challenged the suppression of this evidence pursuant to Section 211.261.2 RSMo. This case does not involve the validity of the Constitution of this State however the constitutional right to confrontation contained in both the United States and Missouri Constitutions, as generally applicable to proceedings under the Juvenile Code and as specifically applicable to Section 491.075 RSMo and 492.304 RSMo is implicated. This case does not involve the construction of a revenue law, treaty or the title to any State office. The Missouri Court of Appeals therefore has general appellate jurisdiction pursuant to Article V, Section Three of the Constitution of the State of Missouri.

STATEMENT OF FACTS

A petition was filed by Appellant against Respondent under Cause JU104-283J (LF 3) alleging two counts of delinquency, one count of child molestation in the first degree, an act which if committed by an adult would constitute a class B felony, and one count of sexual misconduct involving a child, an act which if committed by an adult would constitute a class D felony. On October 26th, 2004, the cause came before the trial court for an adjudication hearing.

At trial the Juvenile Officer called the victim, A.G., to the stand. A.G. was sworn and asked preliminary questions such as her name and address. (LF 7, TR 4) She was able to answer these preliminary questions. She was also able to identify the juvenile (TR 4-5). She was able to testify that something happened on or about November-December 2004. (TR 5). After that, A.G. started to cry and it soon became apparent that she would be unable to continue to testify. Counsel for the Juvenile Officer asked that A.G. be declared unavailable and the trial court so found. (TR 5) The counsel for the juvenile was unable to cross-examine A.G. although he requested to do so. (LF 7, TR 6)

The Juvenile Officer called the forensic examiner from the Child Advocacy Center in Wentzville, Missouri. This witness had performed a forensic exam of A.G. and had videotaped the interview that took place as part of their examination procedures. (TR 8-10). The counsel for the juvenile had viewed the video before the trial and was fully aware of its

contents and the fact that the Juvenile Officer would be seeking its admission at trial.

The forensic interview has the following protocol. No person is present in the interview room except the examiner and victim; however, there are law enforcement officials and representatives of the Juvenile Office in an adjoining room. These people can view the interview as it is taking place through a television monitor and a one-way window that looks into the interview room. Both audio and video are heard and recorded and there is a microphone whereby these people can ask questions directly of the examiner, who has an ear plug receiver. The questions asked cannot be heard by the victim and the examiner is free to disregard them at his or her discretion. The forensic examiner testified to this protocol and further testified that it was utilized in the examination of A.G. (TR 8-10).

Counsel for the Juvenile Officer next called the Investigating Officer, Detective Jason Tillot, to testify. Detective Tillot testified as to the course of his investigation as well as his seizure of the videotape of the forensic interview of the child victim. (TR 11-15).

Counsel for the Juvenile Officer asked that the videotape be entered into evidence. (TR 15). Counsel for the juvenile objected on the grounds that the holding of the U.S. Supreme Court in the case of *Crawford v. Washington*, 541 U.S. 36; 124 S. Ct. 1354; 158 L. Ed. 2d 177; 2004, prohibited the admission into evidence of the video as a violation of the juvenile's Sixth Amendment right to confrontation. The trial court overruled the counsel for the juvenile's objection and received the videotape into

evidence. (TR 15). Additional evidence was adduced and the case was submitted.

The trial court took the case under advisement. (LF 6, TR 59) On November 29, 2004, the trial court issued its Findings, Recommendations and Judgment Denying Jurisdiction wherein the court suppressed the videotape after receiving it into evidence (LF 6-9) and this appeal followed.

POINTS RELIED ON

- A. The trial court erred in suppressing the videotaped forensic interview of the child victim in that juvenile proceedings are civil in nature, not all constitutional rights afforded criminals apply to juvenile proceedings and United States Supreme Court's Ruling in Crawford V. Washington by its facts and language only holds that it applies to criminal proceedings.

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)

In Re Gault, 387 U.S. 1; 87 S. Ct. 1428; 18 L. Ed. 2d 527; 1967 U.S (1967)

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- B. The Trial Court Erred In Suppressing The Videotaped Forensic Interview of the Child Victim In That The Crawford Rule Does Not Apply Under The Facts Of The Case, The Videotape Was Otherwise Admissible Under Various Statutes and The Judicial Officer In A Court-Tried Case Is In A Unique Position To Balance The Probative Value Of Material And Relevant Evidence, The Rights Of The Juvenile Defendant And Juvenile Victims.

In Interest of C.K.G., 827 S.W.2d 760, 767 (Mo. Ct. App., 1992)

H. v. Juvenile Court of St. Louis County, 508 S.W.2d 497, 500

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Mo. Const. Art. I, § 32.

Section 491.075 RSMo

Section 492.304 RSMo.

- C. Assuming arguendo that the right to confrontation was violated, the trial court erred in suppressing the video as unconstitutional in that other remedies were available that would avoid a constitutional challenge

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.

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- D. The trial court erred in suppressing the videotape in its Findings and Recommendations Denying Jurisdiction after admitting it into evidence at trial as such a procedure deprives Appellant of a full and fair hearing.

Black's Law Dictionary Abridged Fifth Edition,

STANDARD OF REVIEW

Ordinarily, when reviewing a trial court's order suppressing evidence, the appellate court should consider the facts and reasonable inferences favorably to the order challenged on appeal. *State v. Bibb*, 922 S.W.2d 798, 802 (Mo.App.E.D. 1996). If neither party disputes the facts, whether the trial court was correct in its ruling must be "measured solely by whether the evidence is sufficient to sustain the findings." *State v. Franklin*, 841 S.W.2d 639, 641 (Mo. 1992). However, as this is an order based upon an alleged violation of the Sixth Amendment to the Constitution of the United States, it is respectfully submitted that the Court should consider the ruling in light of the proper application of the precepts of that Amendment. *State v. Stevens*, 845 S.W.2d 124, 128 (Mo.App.E.D. 1993); *State v. Taylor*, 965 S.W.2d 257, 260-261 (Mo. Ct. App., 1998) and the issue of whether the Amendment was violated is a question of law which is reviewed *de novo*. *State v. Shaon*, 145 S.W.3d 499 (Mo. App., W.D.2004)

ARGUMENT

A. The trial court erred in suppressing the videotaped forensic interview of the child victim in that juvenile proceedings are civil in nature, not all constitutional rights afforded criminals apply to juvenile proceedings and United States Supreme Court's Ruling in Crawford V. Washington by its facts and language only holds that it applies to criminal proceedings.

This appears to be a case of first impression. The issue in this case is whether there is any difference between juvenile delinquency proceedings and criminal proceedings and, if there are differences, does the strict and narrow Crawford rule (hereinafter the Crawford Rule) enunciated in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) apply?

The holding in Crawford stands for the proposition that testimonial out-of-court statements of an unavailable witness are inadmissible as a violation of the Sixth Amendment right to confrontation unless there has been a prior opportunity to cross-examine the witness. This is a significant ruling in that it has overruled thirty years of case law and presumably subsequent legislative enactments based upon such case law. By its very

language, as well as the facts and analysis of the Court, Crawford clearly applies to criminal proceedings “the *Sixth Amendment's* guarantee that, “[i]n **all criminal prosecutions**, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” *Id.* Nowhere in Crawford is its application applied to juvenile proceedings. It is only through the case of *In Re Gault*, 387 U.S. 1; 87 S. Ct. 1428; 18 L. Ed. 2d 527; 1967 that the trial court has found Crawford applicable. It is respectfully suggested that due to the very different purposes of the juvenile and criminal justice systems applying the Crawford rule is contrary to the statutory and public policy purposes of the Juvenile Code in Missouri.

**i) The Purpose of Criminal Proceedings is Punitive
While the Purpose of Juvenile Proceedings is Rehabilitative**

In a criminal proceeding, the purpose is **punitive**. A person who commits a criminal act must “pay for his crime.” The sanction imposed by statute is a formula: (x crime = y sentence) – z time credited. (Time credited may be for a variety of reasons, i.e. time served, etc.)

The purpose of juvenile proceedings is **rehabilitative**. Section 211.011 RSMo sets forth the purpose of the Juvenile Code. It states: “The purpose of this chapter is to **facilitate the care, protection and discipline** of

children who come within the jurisdiction of the juvenile court. This chapter shall be liberally construed, therefore, **to the end that each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control as will conduce to the child's welfare and the best interests of the state**, and that when such child is removed from the control of his parents the court shall secure for him care as nearly as possible equivalent to that which should have been given him by them. **The child welfare policy of this state is what is in the best interests of the child.**”
(Emphasis added)

The Legislature added the last sentence in 1995 to make clear that a child’s best interest is the paramount consideration in administering the Juvenile Code. There is no formulaic solution to the proper disposition of juvenile proceedings nor should there be. Each disposition is tailored to the needs of juvenile and society. For example, a juvenile who steals a single stick of gum may be committed to the Missouri Division of Youth Services while a juvenile who commits a brutal assault may be placed on probation. It is the totality of circumstances of a juvenile’s life (family, school, friends and associations, mental, physical and emotional health, etc.) as well as the delinquent act or acts that are considered in constructing an appropriate disposition. With information obtained from a variety of sources presented

by the Juvenile Officer at its disposal, a court will have the opportunity to craft an appropriate disposition to provide the treatment and services that will assist each individual juvenile and his family to correct their behavior and avoid future contacts with the juvenile and criminal judicial systems. This is a very different approach from the criminal justice system where retribution, restitution and safety of the community are paramount.

Even in *Gault*, the nature of juvenile proceedings as punishment was questioned. “Juvenile proceedings are not criminal trials. They are not civil trials. They are simply not adversary proceedings. Whether treating with a delinquent child, a neglected [*79] child, a defective child, or a dependent child, a juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act.” *Gault supra* J. Stewart, dissenting opinion.

ii) The Concerns Of The Court In The *Gault* Case Have Been Addressed Over The Decades Since It Was Decided.

A reading of *Gault*, shows that it was the failure of the juvenile process to achieve the purported goals of juvenile justice, coupled with a

very real lack of basic due process, that was of major concern to the Supreme Court. ("The constitutional and theoretical basis for this peculiar [Juvenile Justice] system is--to say the least--debatable." supra 17,540,1438. "...this opinion... concentrate[s] upon the failure of the Juvenile Court system to live up to the expectations of its founders..."supra n23, 19, 541, 1439; "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts..." supra 18, 541. 1439) The Court further stated: "...juvenile proceedings to determine "delinquency," which may lead to commitment to a state institution, must be regarded as "criminal" for purposes of the privilege against self-incrimination. To hold otherwise would be to disregard substance because of the feeble enticement of the "civil" label-of-convenience which has been attached to juvenile proceedings. Indeed, in over half of the States, there is not even assurance that the juvenile will be kept in separate institutions, apart from adult "criminals." In those States juveniles may be placed in or transferred to adult penal institutions after having been found "delinquent" by a juvenile court. For this purpose, at least, commitment is a deprivation of liberty. It is incarceration against one's will, whether it is called "criminal" or "civil." And our Constitution guarantees that no person shall be "compelled" to be a witness against himself when he is threatened with deprivation of his liberty

-- a command which this Court has broadly applied and generously implemented in accordance with the teaching of the history of the privilege and its great office in mankind's battle for freedom.” Gault *supra* It is respectfully suggested that the concerns of the Gault court have, over time, been addressed.

In Missouri, by both statute and rule, juveniles receive a plethora of due process rights and privileges, some of which exceed those of adults charged with crimes. Detained juveniles must be housed in detention facilities that are segregated from adults. Section 211.063 RSMo, Section 211.151 RSMo, Rule 111.03(c). A juvenile must be released from detention within twenty four hours of being arrested unless a judge determines the necessity of continued detention. A detained juvenile has a right to a detention hearing within three business days of being taken into custody. Section 211.061 RSMo. The juvenile and their custodian have statutory rights to counsel. Section 211.211 RSMo, Rule 116.01. The standard and burden of proof are identical to those in criminal proceedings. No juvenile charged with a delinquent offense may be compelled to testify against himself. The rights given to a juvenile prior to custodial interrogation exceed those of adults charged with the same offense. Juveniles have a right to have a responsible adult advise them during any such questioning, a right

unavailable to a criminal defendant. Section 211.059.1(3), Rule 122.05. Juveniles who are not accused of law violations (i.e. Status Offenders and Child Abuse/Neglect Victims) may not remain in secure detention unless certain findings are made. Section 211.063.1(1-3) RSMo. The juvenile has a right to a trial. Section 211.171 RSMo, Rule 119.02(5) Illegally obtained evidence may be suppressed in the same manner as criminal proceedings. *Cf.* Section 211.261.2 RSMo

No juvenile may be sentenced and confined in the Department of Corrections unless the juvenile court has dismissed the petition to allow prosecution under the general law, a process that requires significant findings prior to its execution. *Cf.* Section 211.071.6 RSMo.

The circumstances that concerned the Court in *Gault* , such as notice, right to counsel, privilege against self incrimination, separate and appropriate treatment of juveniles, etc. have been so thoroughly incorporated into the Juvenile Code that they are no longer of concern. The different purposes of criminal and juvenile proceedings seem to have been eclipsed by the procedural synchronization between criminal and juvenile and it is respectfully suggested that such synchronization is no longer valid or necessary.

iii) Not All Constitutional Rights Applicable In Criminal Proceedings Are Afforded Juveniles Accused Of Delinquent

It has been generally accepted since *Gault* that the nature of juvenile delinquency proceedings, while denominated as “civil”, is also quasi-criminal. As a result of this hybrid appellation, a juvenile accused of delinquency is afforded certain constitutional rights. The “criminal” denomination arises from the potential loss of liberty and commitment to a “state institution”. However, not all constitutional rights afforded adults facing criminal proceedings are granted to juveniles. The right to a jury trial, the right to bail and the grand jury process are all fundamental rights that apply to criminal cases but not juvenile proceedings in Missouri. These fundamental rights have not been applied to juvenile delinquency cases due to the very different purposes of the criminal and juvenile processes.

The United States Supreme Court has found that *Gault's* sweeping statement that "our Constitution guarantees that no person shall be 'compelled' to be a witness against himself when he is threatened with deprivation of his liberty," *id.*, at 50, is plainly not good law” *Allen V. Illinois* 478 U.S. 364; 106 S. Ct. 2988; 92 L. Ed. 2d 296; 1986 U.S.

We are now encountering the opposite end of the swing of the pendulum whereby the application of criminal concepts is endangering the

basic core concepts of the juvenile justice system. “If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence.” McKeiver v. Pennsylvania, 403 U.S. 528, 551 (U.S., 1971). It is respectfully suggested that there has to be a substantial difference between criminal and juvenile proceedings and that imposition of the Crawford rule on juvenile proceedings eliminates that difference.

**iv) Application Of The Crawford Rule To Juvenile Courts Will
Result In A Removal Of Necessary Discretion From The Juvenile
Courts**

The current circumstance is not one of the exercise of unfettered discretion and power by the Juvenile Court that disregards basic due process, the primary concerns of the Gault Court. Procedures are in place that have been developed for decades to insure the reliability of this type of evidence and allow for its admission. These rules of evidence can be safely and appropriately applied in court-tried cases under the Juvenile Code.

The rule that was established in Ohio v. Roberts, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531, 1979) in 1979 stood for the proposition that statements such as are at issue here are admissible “if the statement bears

"adequate 'indicia of reliability,'" a test met when the evidence either falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." Crawford, supra 8. The Missouri Legislature has enacted specific procedural and substantive statutes, such as Section 491.075 RSMo., to insure that basic due process is provided. In fact, in the area of child welfare, the Legislature has made the Child Advocacy Center process utilized in this case **presumptively admissible** in child welfare cases under the Juvenile Code. See Section 211.059.3(2).

The disregard by the Crawford Court of these carefully considered evidentiary procedures enacted by numerous state legislative bodies over decades should be limited to criminal proceedings where the purpose is punitive. It should not be applied to rehabilitation and treatment of children.

The fact is that application of the Crawford rule will remove necessary and reasonable discretion from the juvenile courts as to the admissibility of evidence these court-tried delinquency cases. This will force upon the juvenile courts an inflexible rule that robs the juvenile court of the ability to balance the rights of a juvenile perpetrator against the rights of a juvenile victim. Such inflexibility goes against the entire purpose of the Juvenile Code in Missouri. A juvenile court should be able to hear evidence and make a determination as to its sufficiency without an artificially

imposed and undefined distinction of whether the evidence is “testimonial” vs. “non-testimonial”. The imposition of the new Crawford Rule would severely limit the ability of the juvenile court to effectively and appropriately administer treatment to a juvenile who has a problem that needs to be addressed.

As stated by the U.S. Supreme Court , "[the] essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold". Allen supra. To apply the Crawford rule to juvenile courts in delinquency proceedings would force the juvenile court into such a common uniform mold. Imposition of such a rule is not what is in a juvenile's best interest. It would require that in certain circumstances, a juvenile's problem go untreated while at the same time re-victimizing the person who has been injured by the juvenile.

It is respectfully suggested that the holding in Crawford v. Washington, 124 S. Ct 1354 (2004), upon which the trial court based its findings, does not apply to juvenile delinquency proceedings.

B. The Trial Court Erred In Suppressing The Videotaped Forensic Interview of the Child Victim In That The Crawford Rule Does Not Apply Under The Facts Of The Case, The Videotape Was Otherwise

Admissible Under Various Statutes and The Judicial Officer In A Court-Tried Case Is In A Unique Position To Balance The Probative Value Of Material And Relevant Evidence, The Rights Of The Juvenile Defendant And Juvenile Victims.

Juvenile delinquency proceedings are *sui generis*. They are presided over by a single judicial officer in the role *paren patrie*. Juvenile delinquent acts are often committed by juveniles against other juveniles, such as had happened in the underlying case. Courts must balance the interests of the juvenile charged with the delinquent offense as well as the rights of the juvenile's victims. As set forth in the previous point, a juvenile charged with delinquent acts has significant protections.

The Legislature enacted legislation meant to balance the rights of defendants and child witnesses and victims when it passed the Child Victim Witness Protection Law in 1985 (Sections 491.675 *et seq.* RSMo.) Section 491.075 RSMo allows out of court statements of a child victim to be used in criminal proceedings. Section 492.304 RSMo provides for the admission into evidence of video and audio recordings of a child victim. In 1992, a constitutional amendment was passed affording certain rights to victims of crime. Mo. Const. Art. I, § 32. Section 595.209 RSMo was enacted as enabling legislation to provide for those rights. Given the significant

constitutional and statutory enactments, it is clear that the public policy of this state requires significant consideration to be given to victims of crimes, especially child victims.

“It should also be remembered that proceedings under the juvenile code are civil, not criminal. Thus, the emphasis of the juvenile code is on continuing care, protection and rehabilitation of the juvenile.”

H. v. Juvenile Court of St. Louis County, 508 S.W.2d 497, 500 (Mo., 1974)

A juvenile judge sits in a unique position. Their primary consideration is for the best interests of the juvenile that comes before the court. They also function as both finder of fact and arbiter of law. Where there are conflicting public policy issues such as are presented here, a balance must be made. A juvenile court judge can achieve this balance but only if allowed the necessary discretion to do so.

“Since the rules of exclusion in the law of evidence as applied in a court of law are largely as a result of the jury system, the purpose of which is to keep from the jury all irrelevant and collateral matters which might tend to confuse them or mislead them from a consideration of the real question involved, when an action is to the court sitting without a jury, the rules of exclusion are less strictly enforced” **In Interest of C.K.G.**, 827 S.W.2d 760,

767 (Mo. Ct. App., 1992). The Crawford rule is just such a rule of exclusion that should not be applied in juvenile delinquency matters.

In the present case, the child victim was sworn and took the stand. She was able to answer some questions but not all. In other words, the victim testified. Section 492.304 RSMo allows the admission into evidence of this type of video and audio recordings. Applying all of the applicable factors enumerated in that statute, the video qualified for admission under Section 492.304 RSMo.

Even if it is determined that the juvenile victim did not “testify” because she was unable to answer some questions, the video qualifies for admission under Section 491.075 RSMo.

The victim clearly suffered from significant emotional trauma which made her unavailable despite the efforts made to have her testify. The fact that the conditions set forth in Section 492.304 have been met is sufficient “indicia of reliability” for admission under Section 491.075 RSMo. It is respectfully suggested that the use of the current statutes and procedures in juvenile delinquency proceedings is appropriate and allowable and that the Court erred in suppressing the videotape as the Crawford rule has no applicability in juvenile delinquency proceedings.

C. Assuming that the right to confrontation was violated, the trial court erred in suppressing the videotaped forensic interview of the child victim as unconstitutional in that other remedies were available that would avoid a constitutional challenge.

Without conceding that the Crawford rule is applicable to juvenile delinquency proceedings, assume *arguendo* that it is applicable in the instant case.

Even based upon such assumption, it is respectfully submitted that there are other remedies available that fail to raise constitutional issues.

First, the trial court could have found the video to be part of the business records of the Child Advocacy Center in Wentzville and thus admissible. Business records were clearly excepted in Crawford as non-testimonial. Crawford, supra 32, 195,1367

Second, the statements made on the video were for the purpose of diagnosis and treatment and were thus also not “testimonial” The Child Advocacy Center provides medical and psychological examination and treatment to child victims of physical and/or sexual abuse. They also make referrals to outside agencies for these services. The video of the forensic interview is only a single, albeit vital, part of the entire range of services

provided by the Child Advocacy Center for the diagnosis and treatment of child victims.

It is respectfully suggested that the trial court erred in suppressing the videotaped forensic interview of the child victim in the manner in which it did as such ruling raises constitutional issues that could have been avoided.

D. The trial court erred in suppressing the videotape in its Findings and Recommendations Denying Jurisdiction after admitting it into evidence at trial as such a procedure deprives Appellant of a full and fair hearing.

The trial court admitted the videotape into evidence after the juvenile's attorney raised objection. (TR 15). The objection offered by the juvenile's attorney was well stated (TR 12-13) and squarely placed before the trial Court the issue to be decided: Does the US Supreme Court's ruling in the Crawford case prevent the admission into evidence of the out of court statement of the child victim in this case under these specific circumstances? The trial court clearly considered the objection and overruled it.

“MR. SMITH: Your Honor, at this time I'd submit Juvenile Office Exhibit No. 1.

MR. SCHROEDER: And, Your Honor, my objection is the same as I've stated previously.

COMMISSIONER SWANN: I understand that. I'm going to overrule the objection. **I will receive this into evidence. ...**" (TR 15, lines 15-21)

The Court went on to say "Since it is a Court-tried case, I'll be writing findings including the findings concerning the case that you've cited today, and I will take that into consideration in my ruling." (TR 15, lines 21-25).

The purpose of an objection is to "call the court's attention to improper evidence or procedure" **Black's Law Dictionary Abridged Fifth Edition**, pg 556 (West Publishing Company, 1983). The purpose of calling the Court's attention to improper evidence or procedure is two-fold.

First, it allows the Court to consider questions of admissibility and competency prior to the receipt into the record of facts that will be relied upon to make the legal adjudication of issues before the court.

Second, by giving the Court the opportunity to make such a decision prior to admission, once the decision is made, all parties to the adjudicatory process will be equally aware of the items in the record that the Court will use in making its adjudication. This is important since if the Court does not allow certain evidence to be admitted, the proponent of the evidence may seek alternative ways to have the evidentiary facts placed before the Court, ex. attempting to lay a proper foundation where an improper foundation objection is sustained. Conversely, if the Court rules that specific evidence is admissible after a specific objection is raised, both parties should be able to

reasonably rely upon the Court's ruling as final and assume that such evidence will be used by the Court in reaching its decision.¹

Here the evidence was admitted after specific objection was made and overruled. After the close of the evidence and submission of the case, the same evidence was then un-admitted, excluded or suppressed based upon the same objection that was previously overruled, without giving Appellant an opportunity to cure the defect. This procedure produces such uncertainty that a proponent of evidence will never know what record, if any, has been established and what facts, if any, will be relied upon by the Court in making its adjudication of the facts of the petition.

Under the specific facts of this case, a child victim was called to testify and did in fact begin her testimony. All parties, as well as the court, were acting under the assumption that the child victim would in fact complete her testimony and then be available for cross-examination.

Do to emotional trauma, this particular child victim was unable to proceed with direct examination and was subsequently unable to be cross-examined. Had the child victim been able to proceed and was available for cross-examination, this issue would not have arisen as the *Crawford* rule does not apply in circumstances where the declarant of the out-of-court statement offered is available for cross-examination. Had the court suppressed the evidence or refused admission during trial, then Appellant could have done several things.

¹ This argument merely goes to the admissibility or competency of the evidence not its weight or persuasiveness.

He could have asked for an adjournment to give the child victim time to compose herself and attempt to continue with her testimony.

He could have asked for a continuance to another date and time for the same purpose.

He could have asked for an *in camera* interview by the court with procedures to allow questions to be posed by defense counsel.

A deposition might have been arranged. These are only a few of the options that might have been utilized to avoid the current issue. It is respectfully suggested that the trial court erred in admitting then suppressing the evidence in the manner in which it did.

CONCLUSION

This case, apparently on of first impression, presents an almost mirror image of the circumstances that concerned the United States Supreme Court when it issued its ruling in *Gault* in 1967. At that time, unfettered discretion by Juvenile Court judicial officers coupled with the lack of any form of procedural requirement to supply basic due process to the juvenile and his parents were the impetus for that Court's decision. Today this Court is faced with the prohibition of the exercise of any judicial discretion in the admission of relevant, material and probative evidence despite decade's long established procedural and substantive due process safeguards. Appellant is not arguing that the Court disregard the Supreme Court's *Crawford* decision but respectfully requests that this Court acknowledge the difference between

juvenile and criminal cases and hold that it is not a distinction without a difference. It is respectfully suggested that the **Crawford** rule does not apply to juvenile delinquent proceedings in Missouri and that the trial court erred in so holding.

Dated October 12, 2005

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, John J. Smith, Legal Counsel for Appellant certify that the Appellant's Brief complies with Special Rule 360 of this Court and Rule 84.06(b). This brief contains 6,082 words and 687 lines. Two copies of this brief in Microsoft Word XP format was served along a copy of said brief on floppy disk that was virus scanned using eTrust InoculateIT version 6.0.102 and was reported by said program to be virus free on Charles Schroeder, Attorney for the juvenile, 2268 Bluestone Dr, Saint Charles MO 63303 on October 12, 2005 by ordinary mail.

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